Developments in the education of legislation and regulation: Germany and Switzerland

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I. Introduction

«Die Uskoken sind tot, es leben die Uskoken.» Kurt Held finishes his book «Die rote Zora» with this striking sentence[88]. The outlaws, forming a gang of Uskokes, i.e. militant fugitives, will now turn to respectable breadwinning.

One may apply the same paradox to the legislation theory («Gesetzgebungslehre») in Germany and Switzerland. «Legislation theory is dead, long live legislation theory!» Indeed, on the one hand, a recent German work comes close to declaring legislation theory dead[89]. On the other hand, a new concept in administrative law considers legislation theory «nowadays established»[90]. Ironically, and bringing back the Uskokes, it is not a clash of schools *pro* or *contra* legislation theory – the first work explicitly cites the second in support of its theory[91]. How do we deal with

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88 Probably based on the old saying: the king is dead, long live the king, cf. DUDEN, p. 318.

89 *See* SCHUPPERT, pp. 7 and 26, referring *to* HELMUTH SCHULZE-FIELITZ. This author raises the question of whether legislative theory is able to comply with its own standards of rationality. He criticizes that legislation theory is merely a collection of well meant but ineffective advice (SCHULZE-FIELITZ, Seismograph, p. 211). The «list of deficiencies» includes e.g. that legislation theory is oriented more on a legal than an interdisciplinary basis, more towards legal institutions than non-legal structures and processes and it is too focused on the parliamentary phase and on national legislation (SCHULZE-FIELITZ, Seismograph, p. 211-212).

90 *See* MERTENS, p. 3-4. In administrative law in particular, research is shifting from statutory interpretation to legislation and decision-making. The establishment of the subject «legislation theory» is cited as a (further) proof for this new perspective (VOSSKUHLE, pp. 18-20, admitting the enduring importance of the law; *see also* SCHMIDT-ASSMANN, pp. 245-246).

91 *See* SCHUPPERT, p. 100.

such seemingly contradictory results?

The paper will first analyze the academic discourse in Germany and Switzerland, looking for an explanation for this seemingly contradictory perception of legislation theory. After that, it will explore the teaching of legislation in these two countries, both for students and practitioners, showing that courses in legislation and regulation exist but that they are not widespread. This picture of education in legislation and regulation would be incomplete without a look at legislation in the political debate and a comparison between Germany and Switzerland. Finally, the paper will close with a personal note on education in legislation, proposing efforts towards a more in-depth legal education in legislation and education.

II. Academic Discourse

1. Origins and Rise of Legislation Theory

It is interesting that one of the first books specifically dedicated to legislation theory was written by an academic who published and taught in Germany as well as in Switzerland. Peter Noll[92] published his book «Gesetzgebungslehre» in 1973. It is certainly true that the discussion on legislation and legislation theory is much older than that; it is one of the «eternal themes» in law and political science[93]. However, Peter Noll's book was well received in both the German and the Swiss academic world and helped to shape the boundaries of a new area of legal theory.

In Peter Noll's book, we see a clear distinction between questions of legislative process («Methode der Gesetzgebung») and questions of

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92 PETER NOLL was born in 1926 in Basel. Before teaching in Zurich, he was a private lecturer at the University of Basel and a professor at the University of Mainz (STRATHENWERTH, p. 6). Many of his works concern legislation theory, e.g. one of his first publications (together with ANDREAS LINN, Stimmbürger und Gesetz – Gedanken zur gegenwärtigen Gesetzgebung und ihren Aufgaben, Basel 1956) as well as one of his latest (Symbolische Gesetzgebung, ZSR 100 [1981], pp. 347-364). He also participated in many legislation projects both in Germany and Switzerland (for details see STRATENWERTH, pp. 1-9). PETER NOLL died of cancer in October 1982.

93 Since the age of enlightenment, in fact, the act of legislation has increasingly attracted more and more academic attention and a whole series of works and essays on the subject of legislation theory or legal drafting has been published (*see* only MADER, évaluation, p. 11 with further references).

legal drafting («Technik der Gesetzgebung»)[94]. Legislative process deals with questions of process and methods when enacting new legislation. Typically, it follows a chronological order from the impetus for a new law to its publication, encompassing e.g. methods of proper fact finding, consultation procedures and the roles of parliament and the administration in preparing new laws. Legal drafting (or legistics) focuses on language, addressees, systematic aspects, density of norms, legal definitions, references to norms outside the law, etc[95].

In later works, an array of different fields within legislative theory developed. Ulrich Karpen, for instance, distinguishes between «analysis of the law», «tactics of legislation», «methods of legislation», «techniques of legislation» and «management and evaluation of law»[96]. Heinz Schäffer sees five main areas of research. According to him, «legislation theory» embraces the reflection on the boundaries of scientific knowledge on legislation[97]. Other fields of work are «legislative analytics», «legislative tactics», «legislative methodology» and «legislative technique» (or legistics)[98].

Legislation theory is not only developed by universities but also by governmental entities and private associations. These organizations have a wide variety of members, such as parliamentarians, university teachers,

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94 *See* Noll, Gesetzgebungslehre, pp. 63-64 and 164-169.

95 *See* Hill, p. 96; Müller, Elemente, pp. 46-49. In Georg Müller's book «Elemente einer Rechtssetzungslehre» legislation theory is separated into «method», «process» and «technique» of law-making (Müller, Elemente, pp. 39-222). However, the author sees a close connection between «methods» and «process» (Müller, Elemente p. 46) and, therefore, the approach is not too different from Peter Noll. Gerhart Holzinger uses the term «legal drafting» in a much wider sense (Holzinger, p. 277-285). According to him, legal drafting includes also the whole planning of a law (including methods and process of law-making). Peter Noll himself does not define «legal drafting» as he considers such a definition as superfluous (Noll, Gesetzgebungslehre, p. 164; little terminology is also found by Schneider, p. 20).

96 *See* Karpen, Gesetzgebungslehre, pp. 190-191; Karpen, Rechtsprechungslehre, pp. 15-16.

97 *See* Schäffer, Theorie, p. 33.

98 Schäffer, Theorie, pp. 33-34. «Legislative analytics» encompasses the basic ideas of norms, laws and legislation. «Legislative tactics» not only includes an analysis of the legislative organs and process but also methods of influencing and steering these. «Legislative method» is based on the legal and political process and raises the question of how to make «good», «sound», «utter» and «effective» laws. On terminology *see* also Maihofer, pp. 24-25 (Methodik, Technik und Taktik); on the difficulties with terminology *see* Hill, Gesetzgebungslehre, pp. 2-3.

administrative staff and other practitioners[99]. They organize conferences, train practitioners and edit journals. Such associations have been founded both in Germany and Switzerland. Two associations should be introduced in detail:

The «German Society of Legislation»[100] was founded in 1988. It aims at stimulating discourse on legislative theory and practice[101] by organizing conferences and lectures. It also publishes the «Journal for Legislation»[102] which appears four times a year. Worth mentioning is the so-called «Prize for Good Legislation» which is awarded annually for an outstanding law (or a draft), a brilliant proposal for an improvement in existing legislation or an important Regulatory Impact Analysis (RIA).

Its Swiss counterpart, the «Swiss Society of Legislation»[103] was founded in 1982 and totals around 150 members. It goals are similar to the German association[104]. Typically, its members are parliamentarians, administrative staff and academics. The Swiss Society of Legislation organizes academic conferences and offers training programs on law-making. Furthermore, it publishes a journal (LeGes – Legislation and Evaluation[105]) and fosters exchange with similar organizations in other countries.

2. From Legislation Theory to Multilevel Regulatory Governance

At first sight, legislation theory is in a comfortable situation. There is a sound scientific basis for legislation theory. Questions of legislation are recurrent themes in the academic discourse both in Germany and in Switzerland. Two scientific societies and two law journals are explicitly dedicated to legislation[106].

However, a closer look reveals serious cracks in this rosy picture. The first crack becomes evident when looking at the products of legislation:

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99 *See* KARPEN, Gesetzgebungslehre, p. 191; DELBRÜCK, pp. 35-36.

100 Deutsche Gesellschaft für Gesetzgebung – DGG (http://www.dggev.de/index.php).

101 *See* § 1 no. 1 of the articles of incorporation.

102 ZG - Zeitschrift für Gesetzgebung (cf. http://www.hjr-verlag.de/hjr/detail/order_nr/0179-4051).

103 SGG or SSL – Schweizerische Gesellschaft für Gesetzgebung (http://www.sgg-ssl.ch/, information is partly available in English).

104 *See* art. 2 of the articles of incorporation.

105 The journal is published three times a year since 1990. Articles are available free of charge in the internet (http://www.bk.admin.ch/themen/lang/00938/02124/index.html).

106 *See supra*.

laws. The lamentation on the poor quality of laws is almost legendary[107]. This is not the place to debate whether such criticism always stands up to sound scientific review[108]. It may be noted, however, that there is a substantial amount of discomfort as to the quality of legislation.

This discomfort goes hand in hand with a certain frustration that academic advice seems to be disregarded repeatedly[109]. To cite one example: Academia is almost unanimous in its insistence that the necessity of a new law is a key question in any legislative process. In practice, new laws are often passed although their need is at least doubtful[110].

Of course, it is easy to blame politicians for such deficits. Indeed, there is little doubt that the rationality of the parliamentary process need not

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[107] One author states that in all the industrialized countries there is the same frustration that there are too many laws and they are poorly drafted (LAMMER, p. 93; *see also* MAIHOFER, p. 3; KARPEN, Germany, p. 197). The critique concerns quality as well as quantity, the latter sometimes described by forces of nature such as «legislative flood» (UHLMANN, p. 786). On the quality of legislation *see also* HILL, Bemühungen, p. 5; SCHWEIZER, pp. 89-93; EICHENBERGER, Gesetzgebung, p. 15; M. MÜLLER, pp. 356-358; FLÜCKIGER, p. 15; MANNING, p. 767; MUSGNUG, p. 23.

[108] In Germany, ULRICH KARPEN's report «Gesetzescheck: Die Gesetzgebung der Grossen Koalition in der ersten Hälfte der Legislaturperiode des 16. Deutschen Bundestages, 2005-2007», giving 22 recommendations to the legislator such as thorough examination of possible costs and the avoidance of «legislative snapshots», was criticized by GUNNAR FOLKE SCHUPPERT as not very helpful and even showing a certain «populist tendency» (SCHUPPERT, pp. 80-81). Sound statistical data does not seem to be available. A swift look at the sheer numbers in Swiss federal legislation reveals that the pages have nearly doubled between 2000 und 2011 (3'112 pages to 6'418 pages). There are roughly 1'900 laws and ordinances on the federal in total level whereas on the cantonal (state) level we find roughly 3'100 laws and 17'500 ordinances (ROTH, p. 309).

[109] *See only* SCHUPPERT, p. 26, speaking of «praktisch weiterhin folgenlosen Verbesserungsvorschlägen».

[110] Unnecessary laws are often labeled «symbolic legislation». Such legislation brings few if any changes in existing legislation but satisfies popular demand for «the legislator to do something». (*see* MÜLLER, Elemente, pp. 171-172; KINDERMANN, p. 225; NOLL, Symbolische Gesetzgebung, p. 355). According to HARALD KINDERMANN, there are three groups of symbolic legislation: reinforcement of social values, (doubtful) demonstration of the state's capability to act, dilatory compromise (KINDERMANN, p. 230). In Switzerland, new regulation on doorstep selling has been introduced despite the fact that it did not apply in the most common cases (MÜLLER, Elemente, p. 172; for another example *see* WENGER, p. 236). According to PETER NOLL and GEORG MÜLLER, certain symbolic rules can be useful in legislation through their legitimating and integrating function (MÜLLER, Elemente, p. 171; NOLL, Symbolische Gesetzgebung, pp. 356-360) as long as they do not block the solution to a real problem (MÜLLER, Elemente, p. 172; NOLL, Symbolische Gesetzgebung, pp. 361-362; for a more critical approach *see* KINDERMANN, 230-239; WENGER, pp. 233-242). For the situation in the Netherlands cf. van GESTEL/MENTING, pp. 11-17.

coincide with legal analysis[111]. However, this seems to be only one side of the coin. A recent Swiss study shows that civil servants also tend to neglect handbooks, check lists and other tools for better legislation[112]. This suggests that other factors must come into play.

The debate on the gap between legislation theory and practice is not made easier by the fact that there is a rather heated academic dispute[113] on the boundaries between political and legislative advice, or more precisely, on whether legislation theory can be academically «neutral» in the light of evident political questions[114]. The discussion seems to have become less virulent in recent times but may help to explain why some concepts of good laws tend to be rather abstract in order to avoid the blame of political bias.

One common criticism of legislation theory is its lack of interdisciplinarity, and hence, that the legislative process and laws do not pay enough attention to factors outside the legal world[115]. There is a similar complaint about a

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111 *See* SCHULZE-FIELITZ, Theorie und Praxis, p. 397; SCHULZE-FIELITZ, Umwege, pp. 862-865; SCHUPPERT, p. 33; UHLMANN, p. 785; for an example *see* KLOEPFER, p. 349. There is some debate whether parliamentarians should care about principles of good legislation. According to AXEL BURGHART, members of parliament cannot be expected to be experts in this field; their true strength lies in negotiating compromises (BURGHART, pp. 135-137; on compromises *see also* SCHUPPERT, p. 356; MÜLLER, Elemente, pp. 17-19). According to ORTLIEB FLIEDNER, on the other hand, parliamentarians should assume responsibility for the quality of their laws instead of passing the buck to the administration (FLIEDNER, Thesen, p. 13; VOIGT, p. 14, appropriately speaks of «love-hate relationship» between politicians and the administration; *see also* WIMMER, pp. 228-229). There are also *initiatives for better regulation* from politics (*see infra* pp. 53-56).

112 In 2009, a study analyzed whether guidelines, handbooks and other legislative tools were observed by the administration. The results were sobering and showed that work in practice differs widely from the procedures recommended by legislative theory (DELLEY/JOCHUM/LEDERMANN, p. 41). This is at least partly confirmed by the administration, citing time pressure as possible reason (*see* GUY-ECABERT, p. 41).

113 MORAND, p. 31, with further references, speaks of a «mauvaise querelle».

114 The debate on «neutral» science («Postulat der Wertfreiheit») goes back to the works of MAX WEBER (*see* WEBER, Der Sinn der «Wertfreiheit» der soziologischen und ökonomischen Wissenschaften, in: Johannes Winckelmann [ed.], Gesammelte Aufsätze zur Wissenschaftslehre, 7. Aufl. 1988, p. 500, cited from HILGENDORF, pp. 1-2). According to SCHÄFFER, Theorie, p. 17-19, legislative theory must judge as it comments on laws, the legal order and its improvements (for a dissenting opinion *see* HILGENDORF, pp. 18 and 32; *see also* MORAND, p. 31; MÜLLER, Elemente, p. 13; NOLL, Gesetzgebungslehre, p. 134-137; RICHLI, Interdisziplinarität, p. 128). The question typically gets more relevant if academics comment on current legislative projects (UHLMANN, p. 784).

115 According to PAUL RICHLI, only the resources of legal science are sufficiently used, which is not enough for good legislation. There are experts from other academic fields

lack of interdisciplinarity in legislative theory. It is undisputed that legistics and legislative theory have many «sister sciences» such as political sciences, sociology and economics but also linguistics, informatics and psychology[116]. However, it seems difficult to integrate these disciplines into legislation theory and into the legislative process in practice[117]. All works on legislation share the challenge of forging a comprehensive theory from different academic disciplines[118].

Financial constraints and time pressure are also typical excuses for bad legislation[119]. Time pressure is a problem not only in the parliamentary process but also for preparatory work; it typically prevents proper fact finding, reflection on goals and good legislative drafting.

More radically, it has been recently suggested that legislation theory just confines itself to a ghetto producing merely well meant, naïve concepts of better regulation[120]. It is not that questions of legislation are not worth discussing, on the contrary. It is that «classical» legislation theory does not catch the essence of modern regulatory challenges, showing particular neglect for other forms of norm-setting by state and private actors. Regulation has become the joint task of various instances at different levels, including national and supranational legislators, and private and public actors. A new term proposed in this respect is «Multilevel Regulatory

during the preparation of new regulations; however, it seems that their knowledge often remains ineffective (Richli, Interdisziplinarität, p. 125).

116 *See* Müller, Elemente, p. 2; Uhlmann, p. 783; Karpen, Gesetzgebungslehre, p. 193; Schulze-Fielitz, Umwege, pp. 867-868. For an earlier discussion on the relationship between sociology and law, *see* Noll, Gesetzgebungslehre, pp. 38-43; Engel, pp. 7-22.

117 Many authors propose interdisciplinary contributions in the conceptual phase of a new law (*see* Schulze-Fielitz, Umwege, pp. 865-866; Schneider, Gesetzgebung, p. 65; Herten-Koch, pp. 196-197; Richli, Interdisziplinarität, p. 125; for a possible solution in Spain concerning bioethical regulation see Montoro Chiner/Casado González, pp. 393-394).

118 *See* Hill, Gesetzgebungslehre, pp. 2-3.

119 *See* Leupold, p. 112 (especially when combined with political pressure from the media); Schulze-Fielitz, Umwege, p. 864, with further references; Schulze-Fielitz, Theorie und Praxis, pp. 397-403; Bühler, p. 477, concerning financial market regulation. On the time needed and the frequency of legislative changes *see* the quantitative measurements by Schuhmacher, p. 65.

120 *See* Schuppert, pp. 26 and 99; for earlier doubts see e.g. Krems, pp. 23-24. However, the critique omits the fact that many earlier works on legislation have not narrowly focused their thoughts on the law but indeed had a wide understanding of regulation and regulatory process. René Rhinow, e.g., criticized in 1979 (pp. 195-202) the categorical differentiation between creating and applying the law (see also Müller, Inhalt und Formen, p. 18).

Governance»[121].

The shift in the academic debate is maybe most aptly recognised by the latest conference of the (still important) «Vereinigung der Deutschen Staatsrechtslehrer» (VDStRL)[122]. The conference deals with basic questions of legislation and interpretation («Grundsatzfragen der Rechtsetzung und Rechtsfindung»)[123]. Three out of four main topics concern questions of legislation but are at least not typical questions discussed in current legislation theory[124].

In sum, the need to understand regulation und regulation processes is more important than ever. It is plausible, however, that «classical» legislation theory only covers some aspects of this problem, neglecting other important factors. The Uskokes must move on to new pastures – if they don't want to give up such fields to other academic disciplines.

III. Education

1. Universities

Academic discourse typically influences the subjects taught at universities. Indeed, universities both in Germany and Switzerland offer courses in legislation. The following remarks and the list in the appendix concentrate on courses offered by law faculties, available in their online course catalogues, usually covering the year 2011 (spring and autumn semester 2011). Only courses specifically dedicated to subjects of legislation theory in the previously discussed sense[125] were considered; other courses usually remain unaccounted for even if they encompass aspects of legislation theory as part of the course (e.g. on constitutional law).

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121 «Multilevel Regulatory Governance» acknowledges that there are many different levels and actors within the law-making process. It encompasses a whole range of different forms of regulations including «hard law» (e.g. laws) and «soft law» (e.g. guidelines or codes). In addition, Multilevel Regulatory Governance is aware that laws result from interaction of different actors, including non-state actors (SCHUPPERT, pp. 330-334).

122 *See* http://vdstrl.zar-muenster.de.

123 *See* http://www.uni-muenster.de/Staatsrechtslehrertagung/index.html.

124 While «Rechtsetzungen der europäischen und nationalen Verwaltungen» can be seen as a typical topic from legislation theory, this is less obvious for «Rationalitätsanforderungen an die parlamentarische Rechtsetzung im demokratischen Rechtsstaat» or «Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung».

125 *See supra*, pp. 44-50.

In Germany, there are fewer than ten universities offering courses in legislation (out of roughly forty universities). The law schools in Augsburg, Berlin (both the Humboldt University and the Free University), Bochum, Cologne and Halle-Wittenberg offer these courses at the bachelor level. Legislation theory also used to be taught at the universities of Hamburg and Leipzig, with the latter still offering courses that touch on some aspects of law-making (e.g. «Einführung in das Recht und die Rechtswissenschaft»[126]).

In Switzerland, courses are to be found in Basel, Bern, Fribourg, Geneva and Zurich, all at master level. No courses are offered in Lucerne, Lausanne and Neuchâtel. The University of St. Gallen offers a seminar[127].

To summarize, it may be said that courses on legislation theory are not part of the curriculum of the ordinary law student in Germany or Switzerland. Comparatively speaking there are fewer courses in Germany than in Switzerland. Requests for more courses in legislation can be heard both in Germany and Switzerland[128]; the numbers however, especially in Germany, have to be considered modest. One may speculate whether the «cracks» in the academic debate[129] may be part of the explanation or whether external factors such as cost-cutting must be blamed. It remains to be seen whether concepts like «Multilevel Regulatory Governance» may spark new courses.

2. Education for Practitioners

Education for practitioners is of some importance in Germany and Switzerland. Courses are usually tailored to administrative personnel but may be also be aimed at members of parliament and academia.

In Germany, the «Berlin Forum», organized by the «German Society of Legislation»[130], offers a platform for discussion among practitioners[131]. The German Federal Ministry of Justice («Bundesministerium der

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126 http://www.uni-leipzig.de/~strafe/index.php?option=com_content&view=article&id=15.

127 «Law and Economics of Regulation and Law-Making» (autmn semester 2011).

128 *See* GERNE, pp. 150-151; HILL, Gesetzgebungslehre, pp. 8-9; KARPEN, Gesetzgebungslehre, pp. 93-94; KARPEN, Zwischenbilanz, pp. 129-130; KETTIGER, p. 78; MADER, Stand und Perspektiven, pp. 146-147; SCHÄFFER, Stand und Perspektiven, pp. 138-139.

129 *See supra*, pp. 44-46.

130 *See supra*, p. 46.

131 *See* KARPEN, Zwischenbilanz, pp. 127-128.

Justiz») edits a handbook for the formal aspects of laws («Handbuch der Rechtsförmlichkeit»)[132]. No further educational courses are to be found, however.

In Switzerland, two seminars («Murtener Gesetzgebungsseminare») are offered, one on legal method (process)[133] and one on law drafting[134]. Each seminar lasts roughly two and a half days. Similar programs can be found in the French speaking part of Switzerland[135]. One-day conferences are regularly organized by the Swiss Society of Legislation[136] and the «Zentrum für Rechtsetzungslehre», Zurich[137].

The «Murtener» seminars in particular are quite well-known in Switzerland and have currently long waiting lists; hence demand is not a problem. This may be at least partly explained by the fact that new laws are typically prepared by the government entity in charge of a specific area of administrative law, and not by a central legislative unit or by specialized parliamentary staff. So, technically, every person working in the Swiss administration may face the challenge of law drafting.

V. Legislation and Politics

It has already been mentioned that legislation theory and political rationality do not always go hand in hand[138]. However, it should not be overlooked that «good» (or even «better») regulation is also a political goal, even if it is not at the top of the political agenda and even if it is sometimes forgotten in the heat of political debate. Both Germany and Switzerland have taken measures to improve the overall quality of legislation. These measures influence academic discourse and education in legislation.

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132 *See* http://hdr.bmj.de/vorwort.html.

133 Organized by Institute of Federalism of the University of Fribourg together with Zentrum für Rechtsetzungslehre (ZfR), Zürich, overviewed by the Swiss Society of Legislation (*see* http://www.federalism.ch/index.php?page=712&lang=1).

134 Organized by Institute of Federalism of the University of Fribourg together with Federal Office of Justice and the Federal Chancellery, overviewed by the Swiss Society of Legislation (*see* http://www.federalism.ch/index.php?page=712&lang=1).

135 See the offers from the «Centre d'étude, de technique et d'évaluation législatives (CETEL)» (http://www.unige.ch/droit/cetel/index.html). Their «Séminaire de Légistique» includes three modules, a basic course and an advanced training.

136 *See supra* p. 46.

137 *See* http://www.rwi.uzh.ch/oe/ZfR.html.

138 *See supra*, pp. 47-48.

Germany has established the «Normenkontrollrat» (NKR) whose tasks are defined in the Law of August 14, 2006[139]. This NKR helps the German government to produce better laws. Better laws are mainly defined by the avoidance of new bureaucracy costs and the reduction of existing costs (§ 1 sec. 2). Costs are expressed by the time private actors need to fulfil their information obligations towards government (filling out forms etc.)[140]. The work of the NKR mainly targets new legislation[141]. It is strongly influenced by the Dutch *Standard Cost Model*[142]. According to both German and the Dutch officials, this system will (hopefully) lead to a 25% reduction in red tape costs[143]. Other initiatives for better regulation in Germany have been less successful[144].

Switzerland has chosen a different approach to improving the quality of its legislation. Both at federal and at cantonal level projects have been initiated to tidy up and improve the law («Rechtsbereinigung und Rechtsverbesserung»). While the federal government has concentrated its efforts on formal issues[145], two cantons (Graubünden, Ticino) have explicitly targeted superfluous legislation and other material aspects of good legislation[146]. On both levels, federal and cantonal, checklists were used. The work was primarily done by civil servants working with these laws.

Initiatives for better regulation also came from local chambers of

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139 «Gesetz zur Einführung eines Nationalen Normenkontrollrats» of August 14, 2006 (BGBl. 2006, I, 1866).

140 *See* SCHUPPERT, p. 93; FRICK/BRINKMANN/ERNST, pp. 32-33; ERNST/KOOP, p. 179. The largest costs are generated by the ministry of finances, especially through taxes (JANN/JANTZ, p. 60). For questions on measurement of costs *see* FRICK/BRINKMANN/ERNST, p. 33; KROLL, pp. 261-262; JANN/JANTZ, p. 55; ERNST/KOPP, p. 183. *See also* ERNST/MEIER, pp. 84-96, discussing the results from the conference of the Bertelsmann Foundation on this subject of December 14-15, 2006.

141 JANN/JANTZ, p. 62.

142 For the Dutch model from a German perspective *see* SCHUPPERT, p. 92; ERNST/KOPP, pp. 185-186.

143 SCHUPPERT, p. 92; ERNST/MEIER, p. 84; FRICK/BRINKMANN/ERNST, p. 32.

144 Formal improvements by the «Erste Gesetz über die Bereinigung von Bundesrecht im Zuständigkeitsbereich des Bundesministeriums der Justiz» of April 19, 2006 (BGBl. 2006, I, 866) resulted in more work for private persons (FLIEDNER, Rechtsbereinigungsgesetze, pp. 404-406). *See also* FLIEDNER, Thesen, p. 17.

145 *See* «Botschaft zur formellen Bereinigung des Bundesrechts», of August 22, 2007 (BBl 2007, 6121), with an overview on similar projects both in Switzerland and Germany (pp. 6129-6134).

146 *See* MÜLLER, Rechtsbereinigung, p. 418. From an international perspective *see* HILL, Bürokratieabbau, p. 725; from a historical persepective see MERTENS, pp. 268-274.

commerce and political allies[147]. In the canton of Zurich, a popular initiative introduced a «Law to Reduce the Density of Legislation and the Administrative Burden on Small und and Medium Enterprises (SME)»[148]. The government of Zurich as well as Parliament rejected the initiative but introduced a counter-project which induced the initiative committee to withdraw its initiative[149].

At federal level, one political party is currently collecting signatures for a popular initiative named «Stop Bureaucracy!»[150]. Among other things, the popular initiative hopes to introduce an individual right to «unbureaucratic» enforcement into the constitution[151].

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147 Canton *Schwyz* (popular initiative «Für weniger Bürokratie», accepted on November 25, 2007); canton *Basel-Landschaft* (popular initiatives «KMU-Förderinitiative» and «KMU-Entlastungsgesetz», accepted on June 5, 2005); canton *Solothurn* (Debate in local parliament on the popular initiative «KMU-Förderinitiative: Weniger Bürokratie – mehr Arbeitsplätze», May 2011); canton *Graubünden* (popular initiative «Gegen unnötige Bürokratie und Reglementierung», supported by the government of the canton).

148 «Gesetz für den Abbau der Regelungsdichte und die Reduktion der administrativen Belastung für kleine und mittlere Unternehmen (KMU)» (ABl 2007, 2296; ABl 2008, 1909). According to the formulated legal text of the initiative the number of legal norms (§ 1 sec. 2 lit. b) and the effort to find and consult them (§ 1 sec. 2 lit. g) should be reduced. Administrative procedures must be simplified (§ 1 sec. 2 lit. d) and coordinated (§ 1 sec. 2 lit. e and § 4). Regulatory impact assessment has to be introduced (§ 3), applying to new as well as to existing norms (§ 3 sec. 3 and § 5).

149 «Gesetz zur administrativen Entlastung der Unternehmen» vom 5. Januar 2009 (LS 930.1). The counter-project was much shorter than the initiative. As the title indicates, the new law focuses on the administrative burden on businesses. Zurich is supposed to reduce the number of administrative units to be consulted, give access to the administration by electronic means, simplify and harmonize forms and data collection by the administration (§ 1 sec. 2). RIA – in respect to the administrative burden on businesses – has been introduced, limited however to new and newly enacted laws (§ 3); older laws must checked on their compliance with the reduction of administrative burden (§ 5), as the new law puts it more vaguely. The new law came into force on January 1, 2011.

150 BBl 2010, 6633.

151 The proposed new article 9a of the Constitution reads as follows: «Every person has a right to laws [...] that are understandable and simply, unbureaucratically and efficiently implemented [...].» The initiative was published on October 12th, 2010 in the Federal Gazette (BBl 2010, 6633) which triggers the 18-month period within the gathering for the necessary 100'000 signatures has to take place (until April 12th, 2012). A successful popular initiative must be submitted to the vote of the people and the cantons, with Parliament either rejecting or supporting the initiative (article 139 sec. 5 of the Federal Constitution of the Swiss Confederation).

It is questionable whether these initiatives will lead to better laws[152]. However, they may – as in Germany – stimulate Regulatory Impact Assessment (RIA) which is not well established in Switzerland. Regulatory Impact Analysis (RIA) was embraced by the Swiss Government in 1999[153], which assigned this task to State Secretariat for Economic Affairs (SECO)[154]. However – as the OECD have pointed out – the RIA is applied rather late in the political process if at all, SECO is inadequately staffed to deal with this task, and in-depth cost-benefit analyses are rarely carried out[155] and if they are, this is often in a «simplified» version in order to assess the needs of small and medium enterprises (SME)[156]. RIA stands also in the shadow of the formal consultation procedure, well established by law and tradition[157]. With the popular initiatives, RIA may become more relevant in Switzerland.

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[152] Markus Schott warns of too high expectations. It is doubtful whether a right to understandable laws can be enforced by courts (Schott, pp. 240-241). The simple and unbureaucratic application of the law is already covered by art. 9 and 29 of the Swiss Federal Constitution. It seems, therefore, difficult to define an area of application for the intended norm (Schott, pp. 242-243).

[153] «Bericht des Bundesrates über Massnahmen zur Deregulierung und administrativen Entlastung» of November 3, 1999 (BBl 2000, 994). The newly drafted Swiss Constitution of 1999 explicitly requires in article 170 that «federal measures are evaluated with regard to their effectiveness» (*see* Mastronardi, pp. 2503-2510; Mader, Artikel 170, pp. 29-37; Biaggini, pp. 757-759.

[154] cf. http://www.seco.admin.ch/index.html?lang=en.

[155] OECD report «Regulatory reform in Switzerland: government capacity to assure high quality regulation» (2006, pp. 43-44). The Federal Office of Justice (FOJ), overseeing legislation in general, also deals with RIA, usually using the term «evaluation». In 2004, a working group between several administrative units, including SECO und the FOJ, prepared a common report on the techniques to measure the effectiveness of federal measures (*see* http://www.ejpd.admin.ch/content/dam/data/staat_buerger/evaluation/umsetzung/schlussbericht-kontaktgruppe-d.pdf).

[156] Following parliamentary motions Durrer (no. 99.3284): «KMU-Verträglichkeitsprüfung für geplante staatliche Regulierungen und Verfahren.» These tests are typically carried out by a series of in-depth interviews with selected firms (Cf. Gautschi, p. 19; Miauton/Gautschi, p. 48).

[157] «Bundesgesetz über das Vernehmlassungsverfahren», Vernehmlassungsgesetz, VIG, of March 18, 2005 (SR 172.061). An official but non-binding translation into English can be found on the website of the federal government (http://www.admin.ch/ch/e/rs/1/172.061.en.pdf; Federal Act of 18 March 2005 on the Consultation Procedure). «The consultation procedure has the aim of allowing the cantons, political parties and interested groups to participate in the shaping of opinion and the decision-making process of the Confederation» (art. 2 sec. 1). «It is intended to provide information on material accuracy, feasibility of implementation and public acceptance of a federal project» (art. 2 sec. 2). For further details of this law *see* Thomas Sägesser, Handkommentar zum Bundesgesetz vom 18. März 2005 über das Vernehmlassungsverfahren, Berne 2006.

It is interesting that both in Germany and Switzerland the political quest for good laws has a strong focus on administrative burdens, especially the costs to private enterprises. There is little mention of cost models in traditional legal training. Cost models and their like have the (strong) appeal of simplicity and objectivity; it may be also politically attractive to «fight» bureaucracy. However, there is little doubt that «good» laws encompass many more factors. Simplistic models are useful only if their information is correctly understood as – maybe small but important – part of «good» legislation.

VI. Germany and Switzerland in comparison

The analysis so far has treated legislation theory as being part of both the German and the Swiss tradition. It is certainly true that there are many similarities, especially between Germany and the German speaking part of Switzerland. However, it might be appropriate to have a closer look at the differences – in order to find out whether Germany and Switzerland are twins, siblings or just distant relatives when it comes to legislation. I will concentrate on three aspects only.

Usually, German law literature is just overwhelming. This is a question of numbers in the first place: There are roughly 82 million German and fewer than 8 million Swiss inhabitants, i.e. a ratio of more than 10:1. Sticking to the figures, there are consequently at least 10 answers from Germany and one from Switzerland to every legal question, assuming that every scholar in Germany and Switzerland writes a comparable amount of books and articles.

There are no statistics available in the field of legislation theory. However, the impression prevails that legislation theory is – relatively speaking more often discussed in Switzerland than in Germany. This assumption is supported by the fact that a higher percentage of Swiss universities offer courses in legislation[158]. This assumption might not hold true for the latest debate on «Multilevel Regulatory Governance»[159], which has yet to find a proper foothold in Swiss academic literature.

As a second point, one might also ask whether the ideals of «good legislation» are not somewhat different in Germany and Switzerland. This

[158] *See supra* pp. 50-52.
[159] *See supra* pp. 49-50.

seems especially true in the area of addressees and language and goes back to the time of the first codifications. Whereas in Germany, the German Civil Code «Bürgerliches Gesetzbuch (BGB)» was built on rigorous legal logic[160], the Swiss Civil Code was written with the explicit intention that every Swiss citizen would understand its provisions[161]. «Der Gesetzgeber soll denken wie ein Philosoph, aber reden wie ein Bauer» («The legislator should think as a philosopher but speak as a peasant»). Even though Jhering's famous dictum was never followed in his home country, it found many followers in Switzerland[162]. Indeed, when Swiss students are asked in their first legislation class what a good law should be about, «simplicity» and «comprehensibility» are the ideals most often named.

Lastly, Switzerland has four national languages[163], three of which are official languages that every federal law has to be translated into[164]. Translation is time-consuming but important work on the quality of legislation. German, French and Italian are all equally suitable for the authentic interpretation of federal law. Hence, the effects of translation on the quality of legislation were more intensely discussed in Switzerland than in Germany where the discussion basically came into view with the European Union and its many official languages[165].

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160 The BGB is, in terms of systematic, style and content, a product of the «Pandektenlehre» addressing a legally-trained audience (Wesel, p. 481-482). There is a saying in Germany that the only difference between the «BGB and the Bible is that the latter has been translated into German» (Klein, p. 197).

161 Eugen Huber, the «father» of the Swiss Zivilgesetzbuch (ZGB), intended a law with a high grade of comprehensibility (Huber, pp. 12 and 14; Hauck, p. 49; Caroni, p. 44). Some «rules» from Eugen Huber are still found in modern works on law-drafting (Müller, Elemente, p. 182; Bundesamt für Justiz, Gesetzgebungsleitfaden, Leitfaden für die Ausarbeitung von Erlassen des Bundes, 3rd ed., Berne 2007, p. 357).

162 *See*, e.g., Lötscher, pp. 135-156; Fleiner, p. 38. On the limits (and dangers) of comprehensibility see Müller, Elemente, pp. 187-189; Ogorek, pp. 297-305.

163 See art. 4 of the Swiss Constitution: «The National Languages are German, French, Italian, and Romansh.»

164 See art. 70 sec. 1 of the Swiss Constitution: «The official languages of the Confederation shall be German, French and Italian. Romansh shall also be an official language of the Confederation when communicating with persons who speak Romansh» (for more details *see* Häfelin/Haller/Keller, no. 1435-1436). Art. 70 sec. 2 of the Federal Constitution authorizes the cantons (states) to decide on their own official languages. The cantons of Bern, Fribourg and Valais consider German and French to be their official languages, while in the canton of Graubünden, they are German, Italian and Romansh .

165 For translations into French see Schmidt-König, pp. 83 et seq.; more generally Gémar, pp. 73-77. According to Mincke, pp. 42-44, translation does not pose a problem as long as it takes place within a single legal system or a similar group of systems, which is the

Language also works as a separator in legislation theory. Although questions of legal process are easily discussed in any language, legal drafting is typically linked to language. Generally, Swiss German scholars tend to pay more attention to the work of their German colleagues than to that of Swiss academics writing in French or Italian.

Despite my potential bias as a Swiss, I would cautiously contend that legislation theory is an area of academic discourse where German and Swiss contributions are each independent and enjoy a level playing field. Switzerland is helped by a strong foundation in administrative practice, an old tradition going back to the time of first codifications and multilingual challenges.

VII. How to Educate in Legislation – a Personal Perspective

Education in legislation theory should be a part of every legal education. Such a statement, coming from a teacher in the field of legislation theory, is obviously biased and must be considered rather as a personal statement than a sound scientific contribution. So be it.

In my view, education in legislation should take place on three levels: It should start at the bachelor level of the legal education. Students should learn the basics of the legislative process («Methode der Gesetzgebung») and of legal drafting («Technik der Gesetzgebung»). Moreover, they should be able to follow the logic from the genesis of a law to its publication (and possibly the subsequent evaluation of its effects). Furthermore, the possibilities and challenges of legal drafting should be demonstrated to students in an effective way with practical examples.

Why is education in legislation early in the studies rewarding? First of all, it helps students to improve their understanding of the political aspects of law and its inherent ties to politics and power. They will also better master the «classical» interpretation of statutory law: whoever has structured a law will better understand the systematic element in interpretation. Whoever has understood which documents and reports are prepared during the legislative process will better understand what the legislator actually intended and what the relevant sources are to determine that intention. Last but not least, students enjoy drafting legal norms. They

case for Switzerland but not the EU (for similar problems before the European Court of Justice, see GÄCHTER-ALGE, p. 110-112).

usually hear a lot of criticism of legislation but they rarely get first-hand experience of actually writing a legislative text themselves (and having it interpreted – sometimes in amusing ways – by their fellow classmates). It is understood that students are not qualified legal drafters after such an experience; such exercises merely expose them to a very delicate task that needs further education both in theory and practice.

At master level, students should learn that the written national law is not the only source of regulation. They must realize that although laws are important, they are by no means the only plants in the «jungle of regulation». International law, standards, codes of conduct, guidelines and recommendations build complex clusters of rules and are strongly intertwined. In addition, formerly unknown economic and social problems require a process of interaction between many players, with different levels of state involvement and responsibility. It is open to question whether one should speak of «Multilevel Regulatory Governance»[166] but this term certainly catches some of the fundamental challenges of modern regulation theory. The courses should, therefore, closely follow the current academic debate, politics and practice; the form of seminars suggests itself.

Students at master level should also be introduced to the sister disciplines of legislation theory such as evaluation techniques, linguistics, political science, public choice theory, etc. Academics from other disciplines should be invited to these courses. As prospective lawyers, students should at least grasp the essence – and maybe the language – of these debates. Legislation projects are often in the hands of lawyers, working with all sorts of experts in different fields. Communication is simpler if one knows at least the basics of their respective expertise.

To sum up, master courses on legislation should be innovative, international, and interdisciplinary[167] - ingredients every ideal master course should consist of. As a result, the term «regulation» – although vague – is clearly better suited to underlining these aspects than «legislation» or «legislation theory».

Finally, training for practitioners should be on the third level of education in legislation. The exchange between law teachers and practitioners is

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[166] *See supra* pp. 49-50.

[167] «Comparative studies» are maybe a more appropriate term but «international» was temping in order to triple the "i"s ...

essential for the quality of education. Practitioners are the touchstone of any concept in legislation theory: if they are not convinced, the concept will typically be flawed. Universities may give new ideas and keep government entities up-to-date. Ideally, universities and government entities work together in designing courses for practitioners. The courses may be integrated in existing patterns of continuing training within the public administration.

In conclusion, I would argue – again on merely personal basis – that legislation and regulation theory does not enjoy the standing in legal education that it should have. This holds especially true for Germany, but also applies to Switzerland. It is possible that the lack of courses may be due to more complex reasons, such as doubts about legislation theory per se. I hope that initiatives from politics, practitioners and academia will give the impetus required to change this.

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